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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 192.

WILLIAM LLOYD BARNARD, JOHN W. DAILEY, CHARLES W. HUMPHREY, DONALD HENRY SMALLIGAN, PETER JOHN SMEDES and ROY HENRY STOUT, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

JOHN W. DAILEY, ROBERT E. LUKENS and JAMES F. BOGUE, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

WILLIAM LLOYD BARNARD, WALTER H. MORSE and HOMER A. KELLEY, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

DONALD HENRY SMALLIGAN, PETER JOHN SMEDES and WILLIAM LLOYD BARNARD, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONERS' REPLY BRIEF.

DANIEL L. BRENNER,
JAMES E. LOCKWOOD,
ROSCOE C. VAN VALKENBURGH,
800 Lathrop Building,
Kansas City, Missouri,

ALVIN C. RANDALL,
WILLIAM S. HOGSETT,
1122 Rialto Building,
Kansas City, Missouri,

EDWIN EARNSHAW,
322 Professional Building,
Kansas City, Missouri,

J. A. DICKINSON,
DAVID PRAGER,
608 New England Building,
Topeka, Kansas,

PATRICK J. WARNICK,
1008 Union Natl. Bank Bldg.,
Wichita, Kansas,

EDWARD F. ARN,
200-11 Beacon Building,
Wichita, Kansas,

JOSEPH H. MCDOWELL,
511 Huron Building,
Kansas City, Kansas,

Attorneys for Petitioners.

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ARGUMENT.

The government says, with studied nonchalance, "The important question, of course, is whether hidden kickbacks would be passed on" (Br. 10, ft. note 3). This is not an important question—it is not even material. The only question on this phase of the case is whether a fixed price

contract with a redetermination clause is contemplated by the statute. The Government skirts around this decisive issue but does not quite come to grips with it; rather the writer contents himself with arguments which say no more than that he feels there are possible evils in the administration of such a contract, and it "should be" within the Statute.

The statute refers only to cost-plus-a-fixed-fee and other "cost reimbursible contracts." The only known definition of such contracts *excludes* a fixed price contract with a redetermination clause (Appendix 15A). And this definition was promulgated by an agency of the Government (Defense Department) which was a party to the contract in question, *and* which urged Congress to pass the Anti-Kickback Statute (U. S. Code, Congressional Service, 1946, p. 1083). This should be the end of the matter. However, the Justice Department of the United States Government does not like the definitions of the Defense Department of the United States Government (which is supposedly the injured party here). It prefers a definition which will permit a conviction. We feel that the Justice Department had in mind the Defense Department Regulations and Definitions when it wrote its brief. However, it was able to dismiss them from its mind, without specifically referring to them, with the statement that " 'Costs contracts' is not a descriptive phrase of immutable content." (Br. 14).

Freedom or imprisonment for these defendants depends upon the definition of a term. The definition that will free them is promulgated and published by the United States Government, which is now prosecuting them. The definition that will free them was accepted by the contracting parties at the time of the alleged acts of defendants, and is *still* accepted by the Defense Department in similar contracts. But now the Government says we must

use a definition that will imprison them. Is this fair? Is this compatible with the rule that we must not enlarge the scope of a criminal statute or adopt a strained construction in order to bring the act of a defendant within its terms? The Government says "yes" to these questions. The reason? Simple, says the Government. The term "is not a descriptive word of immutable content."

The Government persists in stating a proposition which is not at all relevant, and then proceeds to "win" its argument on such "issue." For example, on page 8 it is said "the question is" whether our contract is "'more like' typical cost contracting or firm fixed-price contract." Since it is *not* a cost contract, it does not make one particle of difference whether it's more like a cost contract, or more like something else. Tobacco is more like marijuana than milk and honey. But a prohibition of the sale of marijuana is not a prohibition of the sale of tobacco.

The Government's argument seems to be based primarily on the proposition that, since the parties in renegotiating the price, would take costs into consideration, the parties in "good faith" would try to arrive at a "fair and reasonable price," and that "normally" a contractor would be allowed his costs plus a reasonable profit (Br. 11), therefore, the contract in question "should be" so classified as to come within the Anti-Kickback Act (Br. 13). These arguments apply to *all* contracts, for every seller attempts to "pass on" his costs to the buyer and in addition to make a reasonable profit.

In making such an argument, the Government is embarrassed by the fact that, in negotiating a new price, the parties are not rigidly controlled by the costs (as is the case under a cost reimbursible contract), but negotiate exactly as they would negotiate "prices * * * under a new

* * * contract," and must take into consideration "comparative prices, comparative costs and trends thereof, shop and engineering data and overhead absorption reports." (R. 33, 32, Br. 11). However, the Government brushes this provision aside as not being "meaningful" here. We submit that the reason given for the argument is unusually novel: Since the above language is not contained in "standard clauses" of a certain form of contract (not here involved) with which the writer of the Government's brief happens to be acquainted, therefore, it must not be "meaningful" when found in the contract that *is* here involved (Br. 11, ft. note 5).

The government makes concessions in its brief which are fatal to its position. For example, that the contract in question allows for the practice of "efficiency" by the contractor and preserves the contractor's "incentive to minimize costs" (Br. 12). This characteristic is *absent* in a cost reimbursible or cost-plus-a-fixed fee contract, and its absence is the reason those two types of contracts, and those alone, are mentioned in the Anti-Kickback Act. Another concession is that the contract in question imposes no *standard* for the determination of prices (Br. 11). In a cost reimbursible contract there is a definite, unequivocal standard—costs.

The Government lays great stress on the "fact" that the prices were to be retroactive as to the first 71 airplanes. The contract is confusing and ambiguous on this point. In Sec. 41 (b) (R. 31) it specifically states that they shall be retroactive. Then in subparagraph (d) (R. 32) it says the parties will negotiate to agree upon prices for items to be delivered *on and after the effective date of the price revision*. But suppose the contract *clearly* provides for retroactive prices, what difference does it make?

The Government would have us believe that there are two types of contracts of distinct origin and pure blood, firm fixed price and cost reimbursible, one good and one bad; that by some freak of nature or careless breeding, a cross between the two occurs, and we have a fixed price contract with a redetermination clause; that we must examine and dissect this strange progeny to determine whether the genes of the mother or father predominate. This is not true. It is an accepted and well recognized type of contract and, just as its name implies, it is a fixed price contract, and is so classified by the agency which conceived it (App. 15A). Since it is not covered by the statute, we are not here concerned with the possible effect of its detailed provisions. The Tenth Circuit Court of Appeals accepted the essential part of the Government's argument, but concluded that the contract was a two-headed monster (App. 11A), with one head having a cost reimbursible look, and the other giving every appearance of being fixed price. However, the Court apparently decided that the latter should be ignored and only the former given recognition, resolving all doubt in favor of the Government and against defendants.

The Government argues that it is not necessary that the indictment charge that defendants knew the prime contract was cost-plus-a-fixed fee, or cost reimbursible. In doing so, it falls into the error (as did the Eighth Circuit Court of Appeals in *Harris* v. *United States*, 246 F. 2d 781) of comparing our case to those cases in which, although defendant knew he was committing a crime (such as bank robbery), he did not know whether the federal or state Courts would have jurisdiction to try him. The argument is specious, and hardly requires an answer.

The Government argues that this Court should not grant certiorari because there should first be a trial and

conviction. Where a determination of the issues is fundamental to the further conduct of the case, this Court will grant certiorari. *Land* v. *Dollar*, 67 S. Ct. 1009, 330 U. S. 731; *United States* v. *General Motors Corporation*, 65 S. Ct. 357, 323 U. S. 373. Furthermore, the reason that the contract is in the record is because it was agreed by the Government and defendants that, with the contract before the Court, a final determination of the issues could be made; and, if favorable to defendants, thereby avoid a long and expensive trial. Now the Government says that the "final determination before the trial" should be the first stage at which it gets a favorable ruling. These issues must be decided by this Court at some time. Also, we would like to point out that the Government's appeal from the trial Court's ruling in favor of defendants should have been to this Court, rather than the Court of Appeals, as it admittedly involved the interpretation of a Federal Statute.

We submit that the Government's brief does not in any way answer our petition and for the reasons given in said petition and in this reply, the writ should issue.

Respectfully submitted,

DANIEL L. BRENNER,
JAMES E. LOCKWOOD,
ROSCOE C. VAN VALKENBURGH,
800 Lathrop Building,
Kansas City, Missouri,

ALVIN C. RANDALL,
WILLIAM S. HOGSETT,
1122 Rialto Building,
Kansas City, Missouri,

EDWIN EARNSHAW,
322 Professional Building,
Kansas City, Missouri,

J. A. DICKINSON,
DAVID PRAGER,
608 New England Building,
Topeka, Kansas,

PATRICK J. WARNICK,
1008 Union Natl. Bank Bldg.,
Wichita, Kansas,

EDWARD F. ARN,
200-11 Beacon Building,
Wichita, Kansas,

JOSEPH H. MCDOWELL,
511 Huron Building,
Kansas City, Kansas,

Attorneys for Petitioners.